On Policing Article 2 TEU Compliance

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*Dimitry Kochenov**

ON POLICING ARTICLE 2 TEU COMPLIANCE – REVERSE *SOLANGE* AND SYSTEMIC INFRINGEMENTS ANALYZED

INTRODUCTION

This article aims to provide a systemic critical analysis of the two most detailed proposals currently available in the academic literature to solve the crisis of the Rule of Law plaguing the Union.[1] The focus is on the Reverse *Solange* proposal by Armin von Bogdandy et al.[2] and on the systemic infringement proposal by Kim Lane Scheppele.[3] It also touches upon Jan-Werner Müller's Copenhagen Commission idea,[4] which is not included in the analysis as a separate Part in its own right only due to the fact that the level of legal elaboration and detail surrounding the Copenhagen Commission proposal is less detailed, if approached with an eye toward immediate possible

* Professor of EU Constitutional Law, University of Groningen, The Netherlands. I am grateful to countless colleagues with whom the key ideas expressed in this article have been discussed, especially to Kim Lane Scheppele and Carlos Closa Montero, as well as to Maximilian Steinbeis, who put up bits and pieces of the story-line contained in what follows on the *Verfassungsblog* over the last two years, and to Łukasz Gruszczyński for his support and infinite patience. The research assistance of Justin Lindeboom is kindly acknowledged.

[1] A. von Bogdandy & P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Hart Publishing, Oxford: 2014; J.-W. Müller, *Safeguarding Democracy inside the EU: Brussels and the Future of the Liberal Order*, Transatlantic Academy Paper Series, 2013; D. Kochenov, *Europe's Crisis of Values*, 48 Revista catalana de dret públic (2014) (forthcoming).

[2] A. von Bogdandy et al., *Reverse* Solange – *Protecting the Essence of Fundamental Rights against EU Member States*, 49 Common Market Law Review 489 (2012).

[3] K.L. Scheppele, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systematic Infringement Actions* (2013) http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf; for the proposal in brief, *see* K.L. Scheppele, *EU Commission v. Hungary: The Case for the "Systemic Infringement Action"*, Verfassungsblog, 22 November 2013, http://www.verfassungsblog.de/en/the-eu-commission-v-hungary-the-case-for-the-systemic-infringement-action/#.Uzcje6hdUVB. For the discussion, *see* Verfassungsblog, *Hungary – Taking Action, Episode 2: The Systemic Infringement Action*, http://www.verfassungsblog.de/en/category/focus/ungarn-vertragsverletzungsverfahren-scheppele/#.UzcjsqhdUVC.

[4] Müller, *supra* note 1.

deployment, compared to the two proposals chosen for detailed scrutiny.[5] While none of these proposals is likely, if implemented alone, to solve the current crisis for a number of sound reasons analyzed in detail *infra*, both of them make important contributions worthy of most serious study and consideration. Although the Commission has now released its own proposals on what to do,[6] it is clear that the story will not stop here: we are only witnessing the beginning of a long process of contemplation on how to resolve the outstanding issues in the current context. The crisis we are facing is extremely complex, calling for complex solutions, and elements of the proposals considered in this article will certainly make an important addition to the successful roadmap to resolve the problems the Union is facing.

The only point besides the need to reinforce the values' dimension of European integration, which is abundantly clear with regard to the Rule of Law crisis at this stage, is that the crisis is a test of extraordinary importance, and one which the EU will be facing for some time to come.[7] In this context it is not surprising that so many proposals on how to solve it have been tabled during the recent years, besides the ones which this contribution will be scrutinizing in detail.[8] Vice-President Reding suggests granting the EU general human rights jurisdiction,[9] Venice Commission President Gianni Buquicchio[10] advocates entrusting the Venice Commission with the role of guardian of Article 2 of the Treaty on European Union (TEU), and many others could be named. Yet the two proposals chosen for an in-depth analysis here are of particular importance as they are the most detailed, doctrinally-equipped and influential among all those available.

This article starts by introducing the problematic context of the crisis of the Rule of Law in the EU, in which Article 2 TEU values currently operate. Particular emphasis is put on taking democracy and justice into account, providing background for the analysis of the concrete proposals on how such a crisis can be solved (Part II). Among the recent proposals, two stand out due to their detailed character as well as the clear resonance they have produced in the literature and will be analyzed in the two Parts of the article which follow. The first proposal, prepared by Armin von Bogdandy, attempts

[5] For a general overview and brief assessment of all the proposals currently available in the literature, *see* C. Closa, D. Kochenov & J.H.H. Weiler, *Reinforcing Rule of Law Oversight in the European Union*, EUI Working Paper RSCAS 2014/25. For a systemic analysis, *see* von Bogdandy & Sonnevend, *supra* note 1.

[6] European Commission, A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final.

[7] Kochenov, *supra* note 1.

[8] For an overview of the academic proposals, *see* Closa et al., *supra* note 5. Also see the numerous discussions in the "pages" of the *Verfassungsblog* to which a number of leading scholars contributed: *Hungary – Taking Action*, http://www.verfassungsblog.de/en/category/focus/hungary-taking-action/#.Uz8B56h_uVO.

[9] V. Reding, *The EU and the Rule of Law – What Next?*, SPEECH/13/677, Centre for European Policy Studies 2013.

[10] G. Buquicchio, *Speech at the "Assises de la Justice conference"*, European Commission, 21–22 November 2013, http://ec.europa.eu/justice/events/assises-justice-2013/index_en.htm.

to offer a way out of the crisis through reliance on the national courts in the countries facing the problems. When facing a systemic breach of fundamental rights, such courts will then refer the issue to the European Court of Justice (ECJ) which should, according to the proposal, extend the scope of EU law to such particular and systemic cases of infringement (Part III).[11] The second proposal, prepared by Kim Lane Scheppele, adopts a radically different approach, relying instead on the European Commission's power to bring infringement actions under Article 258 of the Treaty on the Functioning of the European Union (TFEU), and proposes to open up the possibility to construe an actionable infringement by bundling a number of national-level developments together. Each of the developments taken by itself can seem harmless, as Kim Scheppele rightly submits, but when considered as a whole they could produce a totally different impression, allowing the Commission to intervene.[12] Coupled with entrusting the Union with the possibility to subtract Article 260 TFEU fines and lump-sums from the EU funds destined for the Member State in breach, the second part of the proposal offers an economic way to enforce compliance (Part IV).

While both Armin von Bogdandy's and Kim Scheppele's proposals for dealing with the crisis of the Rule of Law are of importance, as they provide valuable starting points in thinking about what to do at this troubling moment of EU integration history, neither of the two is likely to solve the crisis.

1. THE RULE OF LAW CRISIS

Besides a wave of successful Eastern enlargements[13] and an economic crisis which triggered a profound rethinking of the Eurozone and the EMU as such,[14] the new

[11] von Bogdandy et al., *supra* note 2.

[12] Scheppele (*What Can the European Commission Do*), *supra* note 3.

[13] C. Hillion (ed.), *EU Enlargement: A Legal Approach*, Hart Publishing, Oxford: 2004; A. Ott & K. Inglis (eds.), *Handbook on European Enlargement*, T.M.C. Asser Press, The Hague: 2002. It has been persuasively suggested that following the enlargements the EU started exercising a strong legal influence in the neighbourhood: R. Petrov & P. Van Elsuwege (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?*, Routledge, London: 2014; N. Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU*, Hart Publishing, Oxford: 2014. Such suggestions will probably need to be corrected somewhat following the Russian annexation of the Crimean peninsula. Claims that the EU has been really effective in its neighbourhood thus stand to be somewhat corrected. For a critical account, *see e.g.* D. Kochenov, *ENP's New Developments: Imitating Change – Ignoring the Problems*, 9 Comparative European Politics 581 (2011).

[14] F. Amtenbrink, *Europe in Times of Economic Crisis: Bringing Europe's Citizens Closer to One Another?*, [in:] M. Dougan, N. Nic Shuibhne & E. Spaventa (eds.), *Empowerment and Disempowerment of the European Citizens*, Hart Publishing, Oxford: 2012, p. 171; D. Adamski, *Europe's (Misguided) Constitution of Economic Prosperity*, 50 Common Market Law Review 47 (2013); A.J. Menéndez, *Editorial: A European Union in Constitutional Mutation?*, 20 European Law Journal 125 (2014); A.J. Menéndez, *Whose Justice? Which Europe?*, [in:] D. Kochenov, G. de Búrca & A. Williams (eds.), *Europe's Justice Deficit?*, Hart Publishing, Oxford: 2014; D. Nicol, *Swabian Housewives, Suffering Southerners: The Contestability of Justice*

millennium has brought about a new, previously unknown challenge to the European integration project: the EU's crisis of values, which partly originated from the disregard of the most basic essential features of democracy and the Rule of Law at the Member State level: "constitutional revolutions".[15] In part the crisis is due to the EU's own weakness on the values side and, in particular, its total impossibility to ensure that Article 2 TEU is more than just an empty proclamation. The crisis of the Rule of Law[16] is radically different from all the other (numerous) crises in EU history, for at least three reasons.[17]

Firstly, it has demonstrated that the assumption that the EU is and will always be composed of democratic Member States respecting the Rule of Law and other Article 2 TEU values is unfounded – we are not shielded from a possible "Belarusisation"[18] of the EU.

Secondly, it has made it clear that the EU is simply non-operational in a situation where not all the Member States are, on the face of it, "good enough" in terms of adhering to the basics of Article 2 TEU. Mutual recognition, the back-bone of the EU, is profoundly undermined, thus paralyzing not only the future development, but also the day-to-day functioning of the European legal system. This follows automatically from the EU's essence, no matter how you approach interdependence at the Union level theoretically – through the all-affected principle, as a supra-national federation, or through the principle of congruence.[19] With a Belarus (read Hungary) in its midst, the EU simply cannot function successfully, since seemingly all the foundations of integration are undermined.

Thirdly, the Rule of Law crisis has pushed us to realize – and this realization is actually nothing new, but is now more acute[20] – that the EU has overwhelming difficulties not only with policing its values procedurally, but also with supplying them with substantive content.[21] The former is due to the weaknesses of the procedure intended,

as Exemplified by the Eurozone Crisis, [in:] D. Kochenov, G. de Búrca & A. Williams (eds.), *Europe's Justice Deficit?*, Hart Publishing, Oxford: 2014.

[15] M. Bánkuti, G. Halmai & K.L. Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 The Journal of Democracy 138 (2012); K.L. Scheppele, *The Unconstitutional Constitution*, New York Times 02.01.2012; von Bogdandy & Sonnevend, *supra* note 1; Müller, *supra* note 1.

[16] Even the EU bodies call it such: European Union Agency for Fundamental Rights (FRA), *Fundamental Rights: Challenges and Achievements in 2012*, FRA, Wien: 2013, pp. 22–25. On the substance of the crisis, *see* a critically important overview by A. von Bogdandy & M. Ioannidis, *Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done*, 51 Common Market Law Review 59 (2014).

[17] Kochenov, *supra* note 1.

[18] U. Belavusau, *Case C-286/12 Commission v. Hungary*, 50 Common Market Law Review 1145 (2013).

[19] For a detailed analysis, *see* Closa et al., *supra* note 5.

[20] A. Williams, *The Ethos of Europe*, Cambridge University Press, Cambridge: 2010; J. Neyer, *The Justification of Europe: A Political Theory of Supranational Integration*, Oxford University Press, Oxford: 2012; G. de Búrca, *Europe's raison d'être*, [in:] D. Kochenov, F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order*, Cambridge University Press, Cambridge: 2013, p. 21; Kochenov et al. (eds.), *supra* note 14.

[21] On the blurred and unclear nature of what the EU actually promotes abroad when it promotes the Rule of Law, *see e.g.* L. Pech, *Promoting the Rule of Law Abroad: On the EU's Limited Contribution to the*

specifically, to police the values, as set forth in Article 7 TEU.[22] The latter, which is much more problematic, concerns the questionable justice credentials of the Union itself, which seems to stand for little more than the Internal Market for the sake of the Internal Market at the moment.[23] A market which stands alone, without a mantle of ideals,[24] cannot – to paraphrase J.H.H. Weiler – aspire to a constitutionalising role, however important the role it plays.[25] In other words, following Andrew Williams' *Ethos of Europe,*[26] we are probably witnessing something akin to a justice deficit in Europe, which the on-going crisis exemplifies.[27]

Put differently, it is abundantly clear at the moment that the crisis of values – of which the Rule of Law crisis is the most troublesome component – is not a mere matter of concern caused by problematic national-level developments in some countries. Its EU-level component is equally as strong and cannot be ignored.[28] Crucially in this regard, the EU cannot possibly pretend that it is in the position of solving the Rule of Law crisis without a profound rethinking of how values are reflected at the supranational plane. J.H.H. Weiler is absolutely right: growing EU involvement might amount to nothing else but "throwing rocks in a glass-house",[29] thus aggravating the crisis rather than solving it. Without any doubt, all the constitutional delicacy is required at this point – something that the European Commission seems to be willing to demonstrate.[30]

1.1. The general context in which EU values operate

In truth, the "values on which the Union is built" are illusory in a number of respects. The famed Article 2 TEU has arguably never been intended to leave the world of high ideas to land on a *prettore*'s desk. Law and non-law at the same time, it is a beautiful declaration, both righteous and self-congratulatory – indeed, these are the values of our Union! – and destined for foreign consumption: look at our

Shaping of an International Understanding of the Rule of Law, [in:] Kochenov & Amtenbrink (eds.), *supra* note 20, p. 108.

[22] W. Sadurski, *Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider*, 16 Columbia Journal of European Law 385 (2010).

[23] But *see* D. Kochenov, *The Citizenship Paradigm*, 15 Cambridge Yearbook of European Law and Policy 196 (2013) (for an optimistic account).

[24] J.H.H. Weiler, *Bread and Circus: The State of the European Union*, 4 Columbia Journal of European Law 223 (1998), p. 231.

[25] N. Nic Shuibhne, *The Resilience of EU Market Citizenship*, 47 Common Market Law Review 1597 (2010).

[26] Williams, *supra* note 20; A. Williams, *Taking Values Seriously: Towards a Philosophy of EU Law*, 29 Oxford Journal of Legal Studies 549 (2009); D. Kochenov, *The Issue of Values*, [in:] Petrov& Van Elsuwege, *supra* note 13, p. 46.

[27] Kochenov et al., *supra* note 14.

[28] J.H.H. Weiler, *On the Distinction between Values and Virtues in the Process of European Integration* (unpublished).

[29] Closa et al., *supra* note 5.

[30] European Commission, *supra* note 6.

values![31] But with several Member States presumably failing,[32] everything points in one direction: Sir Isaiah Berlin and numerous other thinkers doubting the inherent kindness and reason of mankind were probably right:[33] human nature might be better described in the *Lord of the Flies*[34] than in a dream of Communism inevitable.[35] Most importantly, unlike what many wished to believe, being part of the EU does *not* make a state immune from the potential problems all states face.[36]

Since "people are not angels",[37] they create institutions to be protected from themselves[38] – from extreme passions,[39] from natural fallacies,[40] emotions,[41] biases,[42] from extreme violence,[43] and from extreme "democracy".[44] Indeed, the EU has traditionally been viewed as one of the most effective among such protections – a radical elitist project *par excellence*.[45] The Union created a broad and appealing programme of supranational restraint of the States in relation to each-other,[46] also showing to the world that a different way of sharing a small continent is possible.[47]

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[31] S. Lucarelli, *Values, Principles, Identity and European Union Foreign Policy*, [in:] S. Lucarelli & I. Manners (eds.), *Values and Principles in European Union Foreign Policy*, Routledge, London: 2006, p. 1; M. Cremona, *Values in EU Foreign Policy*, [in:] M. Evans & P. Koutrakos (ed.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World*, Hart Publishing, Oxford: 2011, p. 275; E. Herlin-Karnell, *EU Values and the Shaping of the International Context*, [in:] Kochenov & Amtenbrink (eds.), *supra* note 20, p. 89.

[32] Müller, *supra* note 1, von Bogdandy & Sonnevend, *supra* note 1.

[33] I. Berlin, *Two Concepts of Liberty* (1958), [in:] I. Berlin, *Four Essays on Liberty*, Oxford University Press, Oxford: 1969, p. 1.

[34] W. Golding, *The Lord of the Flies*, Faber & Faber, London: 1954.

[35] E.L. Tuvelson, *The Millenarian Structure of The Communist Manifesto*, [in:] C.A. Patrides & J. Wittreich (eds.), *The Apocalypse: In English Renaissance Thought and Literature*, Cornell University Press, Ithaca: 1984, p. 339.

[36] Kochenov, *supra* note 26.

[37] Publius (J. Madison), *Federalist No. 51*.

[38] A. Sajó, *Limiting Government: An Introduction to Constitutionalism*, CEU Press, Budapest: 1999.

[39] I.P. Couliano, *Eros and Magic in the Renaissance*, University of Chicago Press, Chicago: 1987.

[40] M.J. Lerner & S. Claton, *Justice and Self-Interest*, Cambridge University Press, Cambridge: 2011; D. Kochenov, *The Just World*, [in:] Kochenov et al. (eds.), *supra* note 14.

[41] A. Sajó, *Constitutional Sentiments*, Yale University Press, New Haven: 2011.

[42] C. Sustein, *Designing Democracy: What Constitutions Do*, Oxford University Press, Oxford: 2001.

[43] S. Roy, *Justice as Europe's Signifier: Towards a More Inclusive Hermeneutics of the European Constitutional Order*, [in:] Kochenov et al. (eds.), *supra* note 14.

[44] M. Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 Law & Ethics of Human Rights 141 (2010).

[45] W. Kymlicka, *Liberal Nationalism and Cosmopolitan Justice*, [in:] S. Benhabib, *Another Cosmopolitanism*, Oxford University Press, Oxford: 2006, p. 128, 134. *See also* G. Davies, *The Humiliation of the State as a Constitutional Tactic*, [in:] F. Amtenbrink & P.A.J. van den Bergh (eds.), *The Constitutional Integrity of the European Union*, T.M.C. Asser Press, The Hague: 2010, p. 147.

[46] P. Allott, *The European Community Is Not the True European Community*, 100 Yale Law Journal 2485 (1991) (*see* especially, his diplomacy–democracy distinction). *See also* D. Kochenov, F. Amtenbrink, *Introduction: The Active Paradigm of the Study of the EU's Place in the World*, [in:] Kochenov & Amtenbrink, *supra* note 20, p. 1.

[47] de Búrca, *supra* note 20, p. 21.

Based on the free choice of the participating states (certainly not the peoples, especially initially[48]), the Union has recently proclaimed all things nice in Article 2 TEU, with no legal enforcement mechanism *sensu stricto*.[49] Now the Union is coming to realize that this is probably not enough; which is the reason behind the emerging line of thinking about turning Article 2 TEU – a bunch of solemn proclamations –into something more akin to black-letter law.

1.2. The "problem" with democracy

In doing this however, a lot of caution is required. It is unquestionable that treating Article 2 TEU as black-letter law will "invite ever more adventurous challenges to different national rules", to agree with Jan Komárek.[50] In fact, it would amount to prohibiting a wide range of democratically viable choices at the national level, effectively barring the Member States from making serious (even fatal) mistakes – or at least from moving in that direction – mistakes which could be characterized as such in light of the prevalent understandings in EU law and constitutional and democratic theory today.[51]

While this "attack on democracy" as such can be legitimately criticized – as has been done, for instance, by Floris de Witte[52] – the ethical starting point for any such criticism (which as such is tactically very sound) could be regarded as deeply problematic: the glorification of democracy should not lead to suffering. Following J.H.H. Weiler, Philippe Van Parijs, and numerous others,[53] glorifying democracy beyond its purely instrumental function in building what we would consider a good society is probably not a valid starting point[54] – especially in the context of the EU.[55] In addition it

[48] J.H.H. Weiler, *The State "über alles": Demos, Telos and the German Maastricht Decision*, [in:] O. Due, M. Lutter & J. Schwarze (eds.), *Festschrift für Ulrich Everling*, Bd. 2, Nomos, Baden-Baden: 1995, p. 1651. For an argument for a legally-accepted way of referring to EU citizens as a "European nation", *see* A. Jakab, *European Constitutional Language* (unpublished book manuscript).

[49] Art. 7 Treaty on European Union is not really a legal, but a political procedure.

[50] J. Komárek, *The EU Is More Than a Constraint on Populist Democracy*, *Verfassungsblog*, 25.03.2013, http://www.verfassungsblog.de/en/the-eu-is-more-than-a-constraint-on-populist-democracy/#.UzasOqhdUVA.

[51] On why moving in such direction might be necessary, *see* A. Badiou, *Ethics: An Essay on the Understanding of Evil*, Verso, New York: 2001.

[52] F. de Witte, *Less Constraint of Popular Democracy, More Empowerment of Citizens*, *Verfassungsblog*, 22.03.2013, http://www.verfassungsblog.de/en/less-constraint-of-popular-democracy-more-empowerment-of-citizens/#.UzatMqhdUVA.

[53] *E.g.* J.H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional* Sonderweg, [in:] J.H.H. Weiler & M. Wind (eds.), *European Constitutionalism beyond the State*, Cambridge University Press, Cambridge: 2003, pp. 7, 18: "a democracy of vile persons will be vile"; P. Van Parijs, *Just Democracy: The Rawls and Machiavelli Programme*, ECPR, Colchester: 2012.

[54] On this specific point, *see* in particular J. Mueller, *Democracy and Ralph's Pretty Good Grocery: Elections, Equality, and the Minimal Human Being*, 36 American Journal of Political Science 983 (1992).

[55] Neyer, *supra* note 20; J. Neyer, *Justice and the Right to Justification: Conceptual Reflections*, [in:] Kochenov et al. (eds.), *supra* note 14. But *see* R. Forst, *Justice, Democracy and the Right to Justification*, [in:] Kochenov et al. (eds.), *supra* note 14.

does not fly historically. As has already been recalled, the EU's origins and goals are clearly anti-Statist to a great degree[56] and to pretend that the discovery that such is the case should cause surprise would be unsound in the light of the whole history of the European project's development. Supranationalism is about taming the beast of nationalism – and the story of the creation and enforcement of supranational law is of crucial importance here. Indeed, to quote Judge Lenaerts in one convincing example, "the infringement procedure is a distinctive mark of [EU] law, which makes it different from international law."[57]

Viewed in this light, the idea of making Article 2 TEU enforceable law could be regarded as a legitimate – if not *predestined* and *indispensable* – next step in the evolution of the European project. That the thinking in this direction is nothing new is confirmed by the very texts of the Treaties – besides the function of Article 7 TEU (leaving aside its procedure for the moment), the very story of the Member States' courts bullying the ECJ to ensure that the EU moves into human rights protection,[58] the Rule of Law etc.[59] on which the very notion of direct effect and supremacy of EU law was clearly made dependent, is a clear reminder of what is new and what is not. In light of all this, although we know that Article 2 TEU, when applied as black-letter law, will diminish national democratic space, this is a good thing rather than a bad thing, which flows naturally from all the history and the very purpose of EU integration. Having said that, procedural guarantees have to be put in place to ensure that Article 2 TEU does not become a pretext to ruin EU federalism[60] by allowing the EU to randomly overstep the scope of the powers delegated to it.[61]

1.3. A word for justice

Before turning to the detailed analysis of the proposals in question, one more general remark is apt: while both proposals are of great importance and contain a number of potentially usable elements, the Devil, here at least, is *not* in the details. The key

[56] Davies, *supra* note 45.

[57] K. Lenaerts, *The Rule of Law and Coherence of the Judicial System of the European Union*, 44 Common Market Law Review 1639 (2007).

[58] B. de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, [in:] P. Alston (ed.), *The EU and Human Rights*, Oxford University Press, Oxford: 1999, p. 859.

[59] B. Davies, *Resisting the European Court of Justice*, Cambridge University Press, Cambridge: 2012.

[60] On EU federalism, *see especially* K. Lenaerts & K. Gutman, *"Federal Common Law" in the European Union: A Comparative Perspective from the United States*, 54 American Journal of Comparative Law 1 (2006); R. Schütze, *On "Federal" Ground: The European Union as an (Inter)National Phenomenon*, 46 Common Market Law Review 1069 (2009); J.-C. Piris, *L'Union européenne: Vers une nouvelle forme de fédéralisme?*, 41 Revue Trimestrielle de droit *européen 243* (2005); D. Sidjanski, *Actualité et dynamique du fédéralisme européen*, No. 341 Revue du marché communautaire 655 (1990). Judge Pierre Pescatore has been pointing out the "caractère fédérale de la constitution européenne" even before the formulation of the principle of supremacy by the European Court of Justice: P. Pescatore, *La Cour en tant que jurisdiction fédérale et constitutionnelle*, [in:] *Dix ans de jurisprudence de la Cour de justice des Communautés européennes: Congrès européen Cologne, du 24 au 26 avril 1963*, Heymanns Verlag, Köln: 1963, p. 522.

[61] Closa et al., *supra* note 5: Weiler's contribution, p. 25.

weakness of both proposals lies in the attempt which they make to confine the understanding (and, consequently, the solution) of the crisis to the national level, presenting the main problem which the EU is facing in the context of the Rule of Law and other values as expressed in Article 2 TEU as a problem belonging to the *national* level. Yet – and this is fundamentally important – the crisis is particularly acute because of the EU's own inability – *supranationally* – to provide a substantive take on what Article 2 TEU actually requires. The crisis thus stretches far beyond the non-compliance by some of the Member States with the general values provisions in the Treaties. It also exemplifies the justice void, mentioned above, from which the *EU* suffers.

A successful development of European constitutionalism should thus necessarily take *justice*, most broadly conceived, into account.[62] In other words, a successful approach to dealing with the current crisis of EU values will necessarily have two components: a *supranational component*, focusing on the substance of the values underpinning the supranational legal system; and a *national component sensu stricto*, which will then be confined to ensuring that none of the Member States drifts away from the basic principles and values underlying the common project. Thinking strategically, the urgency of the crisis of the Rule of Law definitely requires tackling the latter first, no question about that. Yet, the former, supranational aspect of the story also has to be taken into account, should we have a mid- to long-term perspective in mind. The analysis that follows, which focuses on the most concrete details dealing with the Member States' deficiencies should thus not be read as ignoring, let alone dismissing, the importance of the EU-level justice issues.

2. REVERSE *SOLANGE*

In a nutshell, Reverse *Solange* consists of applying the logic utilised by the Bundesverfassungsgericht in the famous line of cases where it pushed the EU (acting together with Corte Costituzionale) to establish a system of human rights protection at the supranational level. Under the proposal, while there is a general presumption of compliance of the Member States with the values outlined in Article 2 TEU, in some truly exceptional cases (when a Member State ignores a judgment of the ECtHR, for instance) this presumption can be reversed, bringing about a possibility for the EU – via the ECJ – to intervene. Although the EU does not have a general values-competence, the ECJ is invited *de facto* to police the values (in cooperation with the national courts of the troubled Member States sending preliminary references) as long as the Member State in question cannot do it itself. Just like *Solange* was, Reverse *Solange* would thus amount to a threat of intervention, which is to bring about compliance.

* * *

Armin von Bogdandy's proposal, focusing on inter-court cooperation and aimed at blocking the systemic infringements of rights by the Member States' authorities within

[62] Kochenov et al. (eds.), *supra* note 14.

their scope of competence through extending the scope of EU law to cover extraordinary cases, provides a rich soil for critical engagement. While the general line of argument in the proposal is potentially promising, it is submitted here that the proposal is probably not as innovative and not as practical as its authors suggest. Crucially, it comes across as an almost purely theoretical complex of suggestions, not yet ready for practical deployment. This is the fundamental difference between it and Kim Scheppele's proposal (analyzed in the next Part), which is clearly designed having practical deployment in mind. Armin von Bogdandy's proposal, its decipherable theoretical bias notwithstanding, is an important starting point for further scrutiny of the evolution of the interrelation between EU citizenship, fundamental rights, and the division of competences between the EU and the Member States.[63]

The analysis contained in this Part adopts as a starting point an approach to EU federalism (to use the term in the vein of Robert Schütze,[64] putting our simple human needs, joys, and fears above the self-contained aspirations) radically different from the one which would be expected in the context of *Begriffsjurisprudenz*, which starts with the concept and proceeds to fit the richness of the world to it, rather than taking the individual as such as a starting point. In this context it is impossible not to share von Bogdandy's view that "[c]itizenship and fundamental rights are […] two mutually strengthening concepts which essentially pursue the very same objective, i.e. to bring the Union closer to the individual."[65] Such an approach provides a solid starting point for the analysis of the potential of EU citizenship to interact with fundamental rights.

2.1. EU citizenship in the centre of the picture

The proposal takes infringements of rights as a starting point, opening an opportunity for EU citizens, in cases when the Member States fail systemically, to allege a violation of rights with a potential EU significance, as it were, hoping that the local court to which such distressed citizens turn would refer a question to the Court of Justice over the potential systemic breach. This part of the proposal does not seem to contain much innovation, as the proposal seems to be potentially more restrictive than the *actual* EU citizenship case-law of the ECJ.[66]

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[63] M. van den Brink, *EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously*, 39 Legal Issues of Economic Integration 273 (2012); D. Kochenov, *The Right to Have* What *Rights? EU Citizenship in Need of Clarification*, 19 European Law Journal 502 (2013).

[64] R. Schütze, *From Dual to Cooperative Federalism*, Oxford University Press, Oxford: 2010.

[65] von Bogdandy et al., *supra* note 2, p. 506.

[66] K. Lenaerts, *"Civis europaeus sum": From the Cross-border Link to the Status of Citizen of the Union*, 3 Online Journal on the Free Movement of Workers 6 (2011), especially p. 18; D. Kochenov, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, 18 Columbia Journal of European Law 56 (2011). For an over-arching analysis for EU citizenship's potential to facilitate the enlargement of the scope of EU law, *see* D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge University Press, Cambridge: 2015 (forthcoming).

In a consistent line of case-law, the ECJ has by now formulated a second jurisdiction test, which is an alternative to the classic cross-border situation approach.[67] This new test, first hinted at in *Rottmann*,[68] developed in *Ruiz Zambrano*,[69] and reconfirmed in *McCarthy*,[70] *Dereçi*[71] and *O, S and L*[72] is essentially constructed around a logic identical to that of the von Bogdandy proposal, with one crucial difference: while von Bogdandy requires an overwhelmingly high threshold of a fundamental disruption of rights (such as a refusal to abide by a final judgment of the European Court of Human Rights, for instance)[73] to be met, the ECJ actually places the threshold required for EU law intervention infinitely lower. The test is the "deprivation of the essence of rights"[74] of EU citizenship.[75] The infringement of some essential rights of EU citizens can activate EU law much easier than what von Bogdandy proposes, without any innovations required.[76] In other words, part of what is proposed is not a likely revolution-to-come, but an already important part of

[67] Kochenov (*A Real European Citizenship*), *supra* note 66; S. Iglesias Sánchez, *¿Hacia una nueva relación entre la nacionalidad estatal y la cuidadanía europea?*, 37 Revista de derecho comunitario Europeo 933 (2010).

[68] Case C-135/08 Janko Rottmann v. Freistaat Bayern [2010] ECR I-1449. *See also* D. Kochenov, *Annotation, Case C-135/08, Janko Rottmann v. Freistaat Bayern*, 47 Common Market Law Review 1831 (2010); G.-R. de Groot, *Overwegingen over de Janko Rottmann-beslissing van het Europese Hof van Justitie*, Asiel & Migrantenrecht 293 (2010); G.N. von Toggenburg, *Zur Unionsbürgerschaft: Inwieweit entzieht sich ihr Entzug der Unionskontrolle?*, European Law Reporter 165 (2010).

[69] Case C-34/09 *Ruiz Zambrano v. Office national de l'emploi* [2011] ECR I-1177. *See also* L. Ankersmit & W. Geursen, *Ruiz Zambrano: De interne situatie voorbij*, Asiel- & Migrantenrecht 156 (2011); P. Van Elsuwege, *Shifting Boundaries?: European Union Citizenship and the Scope of Application of EU Law*, 38 Legal Issues of Economic Integration 263 (2011); K. Hailbronner & D. Thym, *Annotation, Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi*, 48 Common Market Law Review 1253 (2011); M. Olivas & D. Kochenov, *Case C-34/09 Ruiz Zambrano: A Respectful Rejoinder*, Public Law and Legal Theory Series Paper 2012/W/1, Olivas: Houston Law Centre, Texas.

[70] Case C-434/09 *Shirley McCarthy v. Secretary of State for the Home Department* [2011] ECR I-3375. *See also* P. Van Elsuwege, *Annotation, Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department: European Union Citizenship and the Purely Internal Rule Revisited*, 7 European Constitutional Law Review 308 (2011); P. Van Elsuwege & D. Kochenov, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, 13 European Journal of Migration & Law 443 (2011).

[71] Case C-256/11 *Murat Dereci and Others v. Bundesministerium für Inneres* [2011] ECR I-11315. *See also* S. Adam & P. Van Elsuwege, *Citizenship Rights and the Federal Balance between the European Union and Its Member States: Comment on Dereci*, 37 European Law Review 176 (2012); N. Nic Shuibhne, *Annotation of Case C-434/09 McCarthy and Case C-256/11 Dereci*, 49 Common Market Law Review 349 (2012).

[72] Cases C-356 and 357/11 *O. and S. v. Maahanmuuttovirasto* and *Maahanmuuttovirasto v. L.* [2012] ECR nyr.

[73] von Bogdandy et al., *supra* note 2, p. 513.

[74] Case C-34/09 *Ruiz Zambrano v. Office national de l'emploi* [2011] ECR I-1177, para. 42.

[75] For an analysis of the problems stemming from the ECJ's approach, *see* Kochenov, *supra* note 63. For an analysis of the history of the doctrine of the deprivation of the essence of rights, *see* M. van den Brink, *The Origins of the Doctrine of the Deprivation of the Essence of Rights*, [in:] Kochenov (ed.), *EU Citizenship and Federalism*, *supra* note 66.

[76] For the history behind this understanding of EU citizenship, *see* D. Kochenov & R. Plender, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, 37 European Law Review 369 (2012).

the *day-to-day reality* in the European Union. What the proposal comes down to then is to give this new reality a doctrinal face and, also, to polish the rules of the application of the new jurisdiction test, which are far from clear at the moment.[77]

Following the recent case-law, it is possible to state with certainty that the law has undoubtedly moved past the point of "cross-border" orthodoxies;[78] that there are two jurisdiction tests used by the Court side-by-side has emerged in all clarity several years ago.[79] Judge Lenaerts also confirmed the existence of the second, purely rights-based, jurisdiction test for the Court.[80] The very contemporary legal reality in the EU thus shields von Bogdandy's proposal from any possible criticism with respect to its starting assumptions, while demonstrating at the same time that it is probably not as innovative as some scholars seem to believe, as it is fully grounded in a currently established line of case-law. The latter fact undoubtedly reinforces the proposal's appeal. Moving to the doctrinal essence of the proposed innovation, at least six criticisms of the proposal can be outlined. These will be approached one by one.

2.2. Why is *Solange* worth copying?

Firstly, the proposal is essentially based on the assumption that *Solange*[81] is an example worth copying. This seems to imply that *Solange* actually functioned in practice, improving the level of human rights protection in the EU (and also in Germany, of course). While this is presumably self-evident for some lawyers, for others, such as myself, no such examples seem to be anywhere in sight. Approached in a purely practical vein, the truth seems to be that rather than directly improving the level of human rights protection, *Solange*-style thinking allows national courts to save face when they need to give in when faced with the growing importance of supranational courts.

Acting by proxy through instigating a change in approaches to human rights at a supranational level is, admittedly, a different matter. The possible argument that *Solange* helped to create an environment of legal pluralism is shaky. To agree with Gareth

[77] For an analysis of the numerous problems, *see*, Kochenov, *supra* note 63.

[78] For a detailed lament concerning how and why such orthodoxies do not actually work, *see* D. Kochenov, *Citizenship without Respect: The EU's Troubled Equality Ideal*, Jean Monnet Working Paper 08/10 (2010). For the most fundamental treatment of this issue, *see* A. Tryfonidou, *Reverse Discrimination in EC Law*, Kluwer Law International, The Hague: 2009. *See also*, *inter alia*, N. Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move on?*, 39 Common Market Law Review 731 (2002).

[79] Kochenov (*A Real European Citizenship*), *supra* note 66.

[80] Lenaerts, *supra* note 66, pp. 17–18: "link with EU citizenship may exist in the absence of a cross-border element".

[81] BVerfGE 37, 271 (1974); BVerfGE 73, 378 (1986); BVerfGE 89, 155 (1993). For analysis, *see e.g.* Weiler, *supra* note 48; M. Herdegen, *Maastricht Decision and the German Constitutional Court: Constitutional Restraints from an "Ever Closer Union"*, 31 Common Market Law Review 235 (1994). *See also* BVerfGE 63, 2267 (2009). For analysis, *see e.g.* D. Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 Common Market Law Review 1795 (2009); C. Wohlfahrt, *The Lisbon Case: A Critical Summary*, 10 German Law Journal 1277 (2009); A. Steinbach, *The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration?*, 11 German Law Journal 367 (2010).

Davies, "where there are multiple sources of apparently constitutional law one always takes precedence and the other is no longer constitutional."[82] As a consequence, such pluralism "is an empty idea."[83] To also agree with J.H.H. Weiler, while ulterior motives should not play an essential role in the legal discourse – "While Jacob and Rachel may make love for sheer carnal pleasure…" – the outcomes most certainly do – "they will not necessarily be bad parents for the eventual offspring."[84] While the intention of the ECJ in going for human rights could be to shield itself from the attacks of the national courts where *Solange* played a rhetorical role, the result was, undoubtedly, the birth of the EU as a human rights organization,[85] in the hands of the ECJ,[86] increasing the level of protection of individual citizens. What *Solange*-minded national courts do, never mind their intentions, amounts, largely, to giving up power. Consequently, it is possible to suggest that *Solange* is probably not the best graft to transplant: its practical usefulness in terms of *actually increasing the level of human rights protection* at the legal level where it emerged can be contested.

2.3. Giving up authority is not the same as claiming power

Secondly, invoking *Solange* comparisons is probably misleading also due to the fact that the whole context of drawing minimal level of protection lines changes entirely once one moves from the national to the supranational level of legal authority. While the main obligation of the BVerfG has always been, undoubtedly, to defend the Basic Law and human rights outlined therein, the ECJ has never had a general human rights jurisdiction.[87] Consequently, the employment of the *Solange* approach by the ECJ comes down to – *de facto* at least – *claiming new power*.[88] Such a claim will then happen without an explicit authorization, thus potentially contradicting the spirit and the wording of Article 4(1) TEU.[89]

It is not clear in this context why allusions to a doctrinal approach, developed in order to be as convincing as possible while gently giving up authority, should necessarily be helpful in the context of enlarging the potential scope of legal intervention within

[82] G. Davies, *Constitutional Disagreement in Europe and the Search for Pluralism*, Eric Stein Working Paper No. 1/2010, p. 3.

[83] *Ibidem*.

[84] J.H.H. Weiler & N.J.S. Lockhart, *"Taking Rights Seriously": The European Court and Its Fundamental Rights Jurisprudence – Part I*, 32 Common Market Law Review 51 (1995), p. 71.

[85] Alston (ed.), *supra* note 58.

[86] de Witte, *supra* note 58, p. 859.

[87] Notwithstanding the fact that the arguments for such a policy are strong: P. Alston & J.H.H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy*, 9 European Journal of International Law 658 (1998), pp. 688–695.

[88] This is the only reason why the ECJ is extremely careful with the "substance of rights doctrine". Even in cases when EU citizens clearly suffer systemic injustice in the hands of their own Member State authorities – like in *McCarthy*, for instance – the ECJ is not really prepared to take their side. The values side of EU integration is highly problematic, but the red lines not to be crossed have traditionally been quite clear: Williams (*Taking Values Seriously*), *supra* note 26.

[89] *See* P. Craig, *Ultra Vires and the Foundations of Judicial Review*, 57 Cambridge Law Journal 63 (1998).

the context of a different legal order. Conceptualizing the two contrarian processes separately would most likely be more helpful. Contradictory foundational assumptions seem to be at play here: the BVerfG did not need to prove that it has to protect human rights as stated in the Basic Law, while the legality of the ECJ's intervention based on a similar claim – notwithstanding what one thinks about its desirability and justifiability – is bound to be broadly questioned.[90] Whether the extension of the powers of the Court to cover Article 2 TEU is a sufficient justification for such a move[91] is an open question which can be discussed at length. What is crucial, however, is the fact that the whole context of such a discussion will necessarily be radically different, logically, from the deployment of the *Solange* logic by the BVerfG.

2.4. Why choose abstract over concrete?

Thirdly, to side with J.H.H. Weiler yet again, "the essential characteristic of the system is defined by the quotidian and regular, rather than the exceptional."[92] Not everybody has to be Schmittean:[93] the exceptional, the extraordinary, although important, are clearly not the main aspect of the functioning of the law.[94]

To provide for a new approach which would allow for EU intervention only in the extraordinary and exceptional cases of "*systemic* violation",[95] which is what von Bogdandy suggests, seemingly stops short of actually realizing the full potential of the recent developments in the field of EU citizenship, which are quotidian, mundane, and ordinary in nature.[96] The most pressing question which arises upon reading the proposal is: "Whom will this help?" Arguably, citizens have little use in the shield from the extraordinary, from the "failure to abide by the final judgment of the ECHR."[97] Rather, there seems to be a need to deal with the day-to-day infractions of rights, which are often nonsensical or unjustifiable, especially when regarded from the perspective of EU law, but are tolerated at the national level for a number of reasons ranging from sovereignty-inspired thinking to what is referred to as the "constitutional traditions" of the Member States.[98]

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[90] There are good reasons for such contestation. *See e.g.* J. Bengoetxea, *Reasoning from Consequences from Luxembourg*, [in:] H. Koch et al. (eds.), *Europe: The New Legal Realism: Essays in Honour of Hjalte Rasmussen*, Djøf, Copenhagen: 2010, p. 39.

[91] von Bogdandy et al., *supra* note 2.

[92] J.H.H. Weiler, *Prologue: Global and Pluralist Constitutionalism – Some Doubts*, [in:] G. de Búrca & J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism,* Cambridge University Press, Cambridge: 2012, pp. 8, 11 (note 4).

[93] C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von Souveränität*, Duncker & Humblot, Berlin: 1922, 1934.

[94] It is true, however, that the extraordinary can destroy the law. *See e.g.* A. Zwitter, *The Rule of Law in Times of Crisis : A Legal Theory on the State of Emergency in the Liberal Democracy*, 98 Archives for Philosophy of Law and Social Philosophy 95 (2012).

[95] von Bogdandy et al., *supra* note 2, p. 512 (emphasis added).

[96] Kochenov (ed.) (*EU Citizenship and Federalism*), *supra* note 66.

[97] von Bogdandy et al., *supra* note 2, p. 513.

[98] For a brilliant contribution approaching EU law in this vein, e.g. as undermining the Member States through *helping* people, *see* Davies, *supra* note 45.

Alongside the simple truth that the meta-approach will be extremely difficult to utilize in practice, it is submitted that it will not solve the most important problems which EU citizens are facing. The current constitutional context is provided by the general trend of constitutional development, consisting of a move, in the words of Moshe Cohen-Eliya and Iddo Porat, from the "culture of authority" to the "culture of justification".[99] The main problem, which thousands of EU citizens are facing, is not connected to the systemic meta-violations of rights, but to a myriad of most mundane ones, which are not dealt with by national authorities – particularly so in the "deviant" Member States, like Hungary. These are caused by the attempts of the Member States to use recourse to their "constitutional traditions" as a pretext to avoid rationally justifying their policies, which can be viewed as infringing human rights, including the rights (even if only partly) stemming from the EU legal order. In this sense, by opening up an avenue for EU citizens to contest deeply-engrained assumptions in thousands of ordinary cases involving the violations of rights of the most ordinary EU citizens, Article 267 TFEU[100] turned the ECJ into a powerful source of Socratic contestation, which is essential for democracy.[101]

Consequently, what is most needed to make the tandem of rights and citizenship more effective is thus precisely the shaping of the mundane everyday necessity to justify the actions of authorities in the eyes of, also, EU law, as was the case in *Rottmann*, *Ruiz Zambrano* etc. – *not* the drawing of some highly abstract lines in the sand, which is what von Bogdandy suggests. Once again, such lines were really helpful so as not to lose face when giving up authority in the actual *Solange* case – a context entirely different from claiming authority based on the violations of rights.

2.5. The "rebutting presumptions" problem: Who will be the judge?

Also in purely procedural terms, the idea of the exceptionality of the EU's involvement seems to be losing out compared to the approach of a quotidian engagement with EU citizenship rights, with no regard to cross-border situations which the Court is *actually* demonstrating in *Rottmann* and *Ruiz Zambrano.*[102] The rebuttal of a presumption of equal protection of rights,[103] which is deployed by von Bogdandy as an essential practical element in the operation of his proposal, is unlikely to be functional in practice since in the majority of cases it will clearly be up to the national courts to judge if the presumption is indeed rebutted, thus *de facto* disqualifying the ECJ from interven-

[99] M. Cohen-Eliya & I. Porat, *Proportionality and the Culture of Justification*, 59 American Journal of Comparative Law (2011) 463. *See also* their monograph: M. Cohen-Eliya & I. Porat, *Proportionality and Constitutional Culture*, Cambridge University Press, Cambridge: 2013. V. Perju, *Proportionality and Freedom – An Essay on Method in Constitutional Law*, 1(2) Global Constitutionalism 334 (2012).

[100] For a most detailed analysis, *see* M. Broberg & N. Fenger, *Preliminary References to the European Court of* Justice, 2nd ed., Oxford University Press, Oxford: 2014.

[101] M. Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 Law and Ethics of Human Rights 141 (2010).

[102] Kochenov (*A Real European Citizenship*), *supra* note 66.

[103] von Bogdandy et al., *supra* note 2, p. 491.

ing. When von Bogdandy clarifies that the rebuttal of such a presumption will be the "basis […] to seek redress before national courts and the ECJ",[104] it is clear where EU citizens will actually end-up with their grievances in the majority of cases. This point is directly related to the first drawback of the proposal identified above: rebutting the presumption to justify a grab of power is essentially different from doing the same to give up power. Moreover, in a country failing to live up to Article 2 TEU requirements, the court system will most likely be the first target of a corrupt government attack, with an eye toward destroying courts' independence, as happened in Hungary.[105] The local courts of such a country should thus be viewed as a potential source of the problem rather than a possible solution to it, themselves in need of help in terms of the Rule of Law and independence guarantees.[106]

2.6. The crux of the problem: How does EU law enter the picture?

It is essential to realize that any activation of rights through the concept of citizenship can be conceptually sound only if the principle of equality is safeguarded.[107] The bitterest issues of rights' contestation in the EU are not all related to the deprivation of the universally recognized basic rights – although these also arise, as the example of Hungary tellingly demonstrates – but to the fact that (1) essentially different contents of seemingly identical rights are guaranteed by the Member States and the EU at their respective levels, coupled with (2) a starting assumption that falling within the scope of the law at different levels disqualifies EU citizens from invoking anti-discrimination guarantees in a situation when (3) the citizens are, literally, shared by the two legal orders.

This is nothing else but the essence of reverse discrimination,[108] which thus seriously qualifies the workability of von Bogdandy's suggested starting presumption that the Member States "generally safeguard the essential content of fundamental rights",[109] which in turn undermines the proposal even further.

Not surprisingly, this problem did not arise at all in the original *Solange* context, where the rights under the Basic Law and EU Law could be legitimately compared. Contrary to von Bogdandy's suggested presumption, the starting assumption behind reverse discrimination is the *non-comparability* of rights of EU citizens.[110] The ECJ

[104] *Ibidem*, p. 518.

[105] For a disastrous example (when approached from the Rule of Law angle), *see* Case C-286/12 *Commission v. Hungary* [2012] ECR nyr, as analyzed by K.L. Scheppele, *How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age,* Part II, *Verfassungsblog*, 09.08.2012, http://www.verfassungsblog.de/de/how-to-evade-the-constitution-the-hungarian-constitutional-courts-decision-on-judicial-retirement-age-part-ii/#.UzceIKhdUVB.

[106] Closa et al., *supra* note 5.

[107] Kochenov, *supra* note 78.

[108] *Ibidem*, pp. 43–52 (and the literature cited therein).

[109] von Bogdandy et al., *supra* note 2, p. 508.

[110] D. Kochenov, *Equality Across the Legal Orders; Or Voiding EU Citizenship of Content*, [in:] E. Guild et al. (eds.), *The Reconceptualisation of European Citizenship*, Martinus Nijhoff, Leiden: 2014, p. 301.

clearly sensed this when deciding *Rottmann* and *Ruiz Zambrano*. In essence, philosophers concur on the fact that a presumption of equality can be as good as a presumption of the lack thereof as long as meaningful deviations from the initial position are allowed.[111] There is not a word in these cases about any cross-border logic[112] simply because it is antithetical to the logic of citizenship, which gradually emerges in full harmony with the Treaty text.[113] Article 20 TFEU, just as Article 9 TEU, is silent about any cross border movements. We are bound by the text of the Treaty and should not read into Part II TFEU what was not included in it by the drafters (e.g. cross-border requirements), who presumably have conferred sufficient powers on the EU to ensure that the text of Part II TFEU is not meaningless.[114]

2.7. The role for the Charter of Fundamental Rights

While von Bogdandy falls back on the fundamental values of the Union in submitting that there is clearly no vacuum outside the scope of Article 51(1) of the Charter,[115] which is limited to instances of the implementation of EU law, the very case-law of the Court which von Bogdandy uses as a starting point seems to supply an illustration of how ephemeral the borderline established by Article 51(1) of the Charter is.[116] While it restricts the EU's human rights involvement, the ECJ is willing to use unwritten rights and principles – such as equality in *Eman and Sevinger*,[117] or the right not to be forced to leave the territory of the Union in *Ruiz Zambrano*[118]– in situations which are undoubtedly *not covered* by the Charter.[119] The Court has clearly demonstrated that it does not regard the Charter as the only source of fundamental rights[120] and – rightly so – that the Charter is not an insurmountable limiting factor on its own fundamental rights jurisdiction. Such developments had been predicted by, *inter alia,* Allard Knook long ago.[121]

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[111] I. Berlin, *Equality*, 56 Proceedings of the Aristotelian Society 301 (1955–1956); D.A. Lloyd Thomas, *Equality within the Limits of Reason Alone*, 88 Mind 538 (1979).

[112] Notwithstanding the direct suggestions made by AG Poiares Maduro in his Opinion to discover such in Case C-135/08 *Rottmann v. Freistaat Bayern* [2010] ECR I-144, Opinion of AG Poiares Maduro, para. 33.

[113] Kochenov & Plender, *supra* note 76.

[114] Kochenov, *supra* note 23.

[115] von Bogdandy et al., *supra* note 2, pp. 509–510.

[116] *Ibidem* (for a detailed analysis).

[117] Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055, para. 71; D. Kochenov, *EU Citizenship in the Overseas*, [in:] D. Kochenov (ed.), *EU Law of the Overseas,* Kluwer Law International, The Hague: 2011, p. 199; L.F.M. Besselink, *Annotation of Case C-145/04 Spain v. U.K., Case C-300/04 Eman en Sevinger, and ECt.HR Case Sevinger and Eman v. The Netherlands*, 45 Common Market Law Review 787 (2008).

[118] Case C-34/09 *Ruiz Zambrano v. Office national de l'emploi* [2011] ECR I-1177, para. 44.

[119] Kochenov, *supra* note 63.

[120] van den Brink, *supra* note 63.

[121] A. Knook, *The Court, the Charter, and the Vertical Division of Powers in the European Union*, 42 Common Market Law Review 367 (2005).

The Charter is not the only, but merely *one of* the documents clarifying the substance and the scope of EU-level human rights protection. Consequently, it is possible to argue that beyond the values of Article 2 TEU there can be numerous other sources of inspiration guiding the Court in discovering and protecting fundamental rights outside the limitations imposed by Article 51(1) CFR. It is noteworthy that the Court has never turned to the Charter in its recent groundbreaking case-law on the scope of its jurisdiction in EU citizenship cases. This is not surprising however: the ECJ opened up the potential for *rights* to play the key role in activating EU law, and the Charter is limited to the scope of this very law, which means that the rights deployed by the Court to enlarge the scope of its own jurisdiction are *bound to be* non-Charter rights.[122] Crucially, however, such non-Charter rights are not confined to Article 2 TEU. The proposal's emphasis on the importance of Article 2 TEU, although interesting, is seemingly not indispensable, as the lack of references to Article 2 TEU in the recent EU citizenship case-law seem to demonstrate. Using the rights of EU citizenship as a paradigm of thinking about EU law activation does not seem to require, *per se*, Article 2 TEU fixations. This is good and bad news: EU citizenship and von Bogdandy's proposal need the violations of *rights*, while Article 2 TEU, very importantly, is not about rights only. One can easily imagine a regime which totally disregards Article 2 TEU requirements, yet is attentive to safeguarding basic human rights – a situation Kim Scheppele has been referring to in her numerous talks about Hungary.[123] In such a context the way to bring it in compliance with EU's values will necessarily imply departing from the safety-net of human rights protection.[124]

3. SYSTEMIC INFRINGEMENT PROCEDURE

What Kim Scheppele proposed is, in essence, to use the existing law-enforcement provisions, including Articles 258 and 260 TFEU to make them 'catch' the cases when EU values are infringed through enabling the Commission: a) to bring cases against the Member States which fall short of complying with Article 2 TEU based on a cumulative analysis of their operation in a number of different fields. The idea is that individual instances of compliance and failure to comply with EU law, when approached together, systemically, can produce valuable insights, forming a convincing case. Otherwise put, a sum can be more important than its parts, pointing in the direction of a systemic infringement. To ensure that the Member States found in breach comply with ECJ's decisions it is proposed b) to deduct their fines and lump-sums (following the application of Article 260 TFEU) directly from the moneys destined for the Member States in

[122] For an analysis, *see* Kochenov, *supra* note 63.

[123] *See e.g.* Scheppele, *supra* note 15. For a discussion, *see* Verfassungsblog's special feature Hungary, which originated in Professor Scheppele's analysis: *Verfassungsblog*, *supra* note 8.

[124] Closa et al., *supra* note 5.

question from the EU budget thereby ensuring that the Member States return into the realm of EU values.

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Kim Scheppele's proposal thus adopts a radically different approach compared to von Bogdandy's. First of all, it seems to be more tailored to practice, aiming to make an impact on the ground, with a lesser bias towards doctrinal approaches than that demonstrated by von Bogdandy's 'Reverse *Solange*' proposal. This becomes particularly obvious if we make the trick (suggested in the proposal itself[125]) of substituting Article 2 TEU with Article 4(3) TEU, which establishes the duty of loyalty – a clearly justiciable and much-used principle of EU law.[126] Secondly, similarly with von Bogdandy's proposal what Kim Scheppele suggests is much less revolutionary than it might seem, which is – again just as with von Bogdandy – also a positive feature. This is particularly so if one has an eye on possible implementation. Unlike Vice-President Reding's suggestion to expand the scope of the Charter of Fundamental Rights beyond what Article 51 CFR now allows[127] or Jan-Werner Müller's idea to create a new institution in charge of monitoring and enforcing Article 2 TEU values,[128] Scheppele's proposal does not require a Treaty change or the creation of new EU organs, either within or outside the Treaty framework, and could thus potentially be deployed swiftly. Lastly, and very importantly, it is not directly dependent on the national judiciaries in the troubled Member States, which distinguishes it positively from what von Bogdandy suggests.

Coming from such an established voice advocating the protection of Rule of Law at the national level, Kim Scheppele's proposal definitely enjoys sufficient legitimacy to be taken very seriously. In what follows, this Part will address what is termed here as the "problem" with bundling infringements, the problem of determining the meaning of "values", and the problem with Article 260 TFEU penalties as the main way to enforce the promise and the presumption of Article 2 TEU. This Part demonstrates that two of the three "problems" are largely fictitious and thus moot, but at least one is potentially very real and will need to be addressed before the eventual deployment of the proposal in question.

All in all, given that Kim Scheppele's idea of systemic infringement proceedings does not require Treaty change while at the same time steering clear of supplying a rhetorical justification for a serious power-grab in the context of EU federalism, and in addition allows the Commission to act in its established capacity of the guardian of the Treaties,[129] the proposal is infinitely stronger than the one analyzed in the previous Part.

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[125] Scheppele (*What Can the European Commission Do*), *supra* note 3, p. 5.

[126] For an analysis of the different combinations of these (and related) Treaty provisions in the context of dealing with the crisis of values, *see* Closa et al., *supra* note 5, pp. 9–10.

[127] Reding, *supra* note 9.

[128] Müller, *supra* note 1.

[129] Art. 17(1) TEU.

3.1. The "problem" with bundling

Kim Scheppele's proposal consists of two components. The first concerns the way to deploy Article 258 TFEU to ensure that the problems with living up to the values of Article 2 TEU are effectively caught by the infringement procedure – by bundling infringements to allow the Commission and the Court to see the bigger picture of a systemic infringement. The second component is about the modalities of the collection of fines and lump-sums from the Member States found to be in breach, thus "perfecting" the way Article 260 TFEU is used. Fining is one thing (and is also a separate procedure and a provision in the Treaty); finding a breach is another. It thus makes sense to start the analysis with the suggested bundling practices proposed for determining whether there is a systemic breach.

How innovative will the bundling of infringements be *per se*? The practice is known to the Court and although the Treaties do not contain any direct references to bundling, there seem to be no reasons why we should not be convinced by the reasoning of the ECJ in *Irish Waste*:[130] "the fact that the deficiencies pointed out in one or other case have been remedied does not necessarily mean that the general and continuous approach of those authorities, to which such specific deficiencies would testify where appropriate, has come to an end."[131] Indeed, the whole story of the Commission's guardianship of the Treaties by bringing non-compliant Member States to Court is a story of seeing the patterns in numerous infringements and, eventually, bundling them together, as brilliantly analyzed by Pål Wennerås.[132]

Plenty of current Commission activities in the context of Article 258 TFEU *de facto* imply bundling. Whether it monitors what the Irish do with their waste for 24 years, breaking the law everywhere all over the country – or observes how for ten years French farmers attack and harass strawberry-bearing Spaniards in full sight and with the full complacency of the French state,[133] what we are dealing with is, it seems, nothing but bundling of numerous tiny infringements, which allows the Commission to see the bigger picture. The latter then constitutes the real infringement of the law.

Importantly, however, bundling goes beyond the mere summing up of infringements – it allows discovering a new type of breach based on the reality of discovery and cumulation. AG Geelhoed in *Irish Waste* added an interesting aspect to the infringement story, which was picked up by the Court, stating that the cumulation as such can result in a finding of a *different* infringement.[134] This does not go so far as to state that the cumulation of seemingly innocent practices (as could be the case in bundling legitimate constitutional developments which can constitute a potential breach of EU

[130] Case C-494/01 *Commission v. Ireland* [2005] ECR I-3331.

[131] *Ibidem*, para. 32.

[132] P. Wennerås, *A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (Gap) Infringements, Lump Sums and Penalty Payments*, 43 Common Market Law Review 31 (2006).

[133] Case C-265/95 *Commission v. France* [1997] ECR I-6959.

[134] Case C-494/01 *Commission v. Ireland* [2005] ECR I-3331, Opinion of AG Geelhoed, para 19.

values only if considered *together*), could produce illegal results, but the "cumulation trend" is clear.

The current practice of the ECJ can be interpreted as pointing in the direction of broadening the utilization of bundling practices in the future. Pal Wennerås, one of the leading legal minds in this field, suggested, based on a most meticulous analysis of the law, the bundling and finding of infringements based on the numerous violations of *different* instruments in one sector of the *acquis*,[135] which would make perfect sense since, understood systemically, the infringement procedures in the Treaties have only one objective: to ensure that the Member States comply with the letter and, crucially, with *the spirit* of the law, the latter coming uniquely to light when a number of concrete practices is analyzed. It is impossible to argue convincingly that Article 258 TFEU can only be utilized when *one* particular provision of the Treaties or secondary law of the EU is breached. In this sense, once bundled infringements based on examples coming, simultaneously, from different areas of the *acquis* are possible, it would be only logical to also extend such cross-sectoral bundling in the way suggested by Kim Scheppele to ensure that the values of the Union are observed and safeguarded.

The innovative nature of Kim Scheppele's proposal is thus not in bundling *as such*, but in the audacity with which the practice of bundling potentially ventures into the murky waters where law and policy meet and nothing is as clear as in the context of the straight-forward internal market *acquis*: the proposal suggests an important move to seriously upgrade the current practice. While innovative, it seems, at the same time, to be fully grounded in the law as interpreted by the ECJ – a logical continuation building on the established current practice.

3.2. Determining the exact meaning of values

Moving bundling beyond the *acquis sensu stricto*, to allow it with the aim of ensuring compliance with Article 2 TEU reveals an acute problem, which is profoundly ideological: who is to decide what is democracy, the rule of law etc.? This is the essential problem which the EU is facing at the moment and which has been touched upon in the Introduction to this piece. Crucially, for an infringement of Article 2 TEU be found directly it will be necessary, as Jan Komárek also suggested,[136] to create an *acquis* on values, which does not exist.[137] While the Copenhagen criteria[138] and their progeny reflect an attempt to mould such an *acquis* in the context of the pre-accession assessment of the candidate countries,[139] the practice left much to be desired – the

[135] Wennerås, *supra* note 132, p. 49.

[136] Komárek, *supra* note 50.

[137] E. Herlin-Karnell, *EU Values and the Shaping of the International Legal Context*, [in:] Kochenov & Amtenbrink, *supra* note 20, p. 89; Kochenov, *supra* note 26.

[138] Bull. EC 6-1993, point I.13.

[139] For analyses, *see e.g.* C. Hillion, *The Copenhagen Criteria and Their Progeny*, [in:] Hillion (ed.), *supra* note 13, p. 19; D. Kochenov, *Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law*, European Integration Online Papers 8(10) (2004), p. 1.

Commission clearly demonstrated that at times it had no clue of what it was actually doing, especially in the medium to long-term perspective – which essentially handed us all the problems we are facing today.[140] The myth of this exercise's success is very puzzling: it has clearly been a failure, which brought Hungary and other countries highly problematic from the point of view of values into the Union, only pretending to solve the outstanding problems, thus preferring Potëmkin villages to solid constructions.[141] While there is no *acquis* on values, the Commission failed to shape substance behind Article 2 TEU, which it clearly could have done – if not was *supposed* to do – in the pre-accession context.[142] This provides a viable source of scepticism in thinking about Jan-Werner Müller's suggestion. Can the Commission (or a Copenhagen Commission) do better this time around? There is no guarantee.

Allowing the Court to shape the essence of the values expressed in Article 2 TEU by turning them into law (which is what Kim Scheppele's proposal comes down to in practice) could be a viable strategy. Indeed, this is exactly what has already happened with one important value – namely, the protection of human rights mentioned above. Uniquely ECJ-made, with recourse to a number of inventive, cautious and ultimately convincing tools, it is now codified in a largely unworkable Charter of the Member States' making, which even the Vice-President of the Commission seems to regard as an *obstacle* on the path to treating Article 2 TEU seriously. In the context of the Member States' and the Commission's performance in this area, both being clearly very poor, the Court is probably the most reliable actor to entrust the law of values to, even if the Commission will likewise play a part.

While this might be desirable, some clearer connections with EU law (read the EU's *acquis* as now understood) are seemingly required, besides the sheer desire to impose militant democracy on all the Member States of the Union. One of such factors could be an ability to demonstrate that the changes in the institutional structures and administrative and legal practices of a particular country have a strong potential to hinder the development of EU law, thereby activating the duty of loyalty, which can now be used as a self-standing instrument. A reference to values could be added, too. It is necessary to be acutely aware of the fact that making values a self-standing tool in the hands of the Commission and the Court could *threaten the vital balance of powers* in the context of European federalism.

Numerous different ways of approaching loyalty could be outlined – from outlining the doubts related to the functionality of the judiciary of the Member State in ques-

[140] E.g. D. Kochenov, *The ENP Conditionality: Pre-Accession Mistakes Repeated*, [in:] L. Delcour & E. Toulmets (eds.), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood*, Nomos, Baden-Baden: 2008, p. 105.

[141] The enlargement as such, however, was clearly a success. For a broader picture, *see e.g.* M. Vachudova, *Europe Undivided: Democracy, Leverage and Integration after Communism*, Oxford University Press, Oxford: 2005.

[142] For criticism of the Commission's performance, *see e.g.* D. Kochenov, *EU Enlargement and the Failure of Conditionality*, Kluwer Law International, The Hague: 2008.

tion in the context of EU law, to pointing to overtly hostile acts *vis-à-vis* neighbours by harming their citizens (which is the case with Slovakia today, for instance[143]). Creating a catalogue of possible causes of action which would be firmly in the realm of EU law to connect to Article 2 TEU, and which would be capable of supplying indicators of a Member State's failure to comply based on an array of signs, would be a most useful enterprise – akin to the one in which the Dutch section of FIDE engaged in a search for direct effect before *meester* Stibbe came up with *Van Gend en Loos* and then *Da Costa*.[144]

3.3. The problem with penalties

The second part of the proposal – the one dealing with fines and lump-sums and their collection – arouses much more scepticism than the first one, which is roughly rooted in current practice and boasts a clear potential.

This scepticism is chiefly connected to the main assumption that is entertained in the proposal, namely that fining Member States and making them pay works and improves compliance. Much of the existing literature seems to point to the contrary.[145] So while "how to collect the money?" is definitely a legitimate question, it seems to have very little to do with the enforcement of EU values (or, indeed, EU law) in the Member States. Looking at the numbers of fines assessed and the results this brought about in terms of correcting Member State behaviour during the 20 years of operation of the relevant Treaty provision, it is impossible not to agree with a recent study by Brian Jack: "[the story] clearly suggests that [ECJ's] lump sum penalties have not had dissuasive effects."[146] Moreover, the number of times when the provisions have been used so far (14!)[147] clearly points to its profound deficiency not only in design, but also in application (especially knowing the level of some Member States' compliance). Indeed, Jack looks in the direction of Article 7 TEU for possible help in this context, while all the proposals made to date relating to enforcement of the Rule of Law in the Member States take as a starting point the dysfunctional nature of that specific provision,[148] which seems to be the reason why Kim Scheppele looks at fines and Armin von Bogdandy at Article 267 TFEU in the first place. The fact of the matter is that *both* Article 7 and fines are problematic.

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[143] J.-M. Arraiza, *Good Neighbourliness as a Limit to Extraterritorial Citizenship: The Case of Hungary and Slovakia* (unpublished).

[144] As reported by A. Vauchez, *The Transitional Politics of Judicialization: Van Gend en Loos and the Making of EU Polity*, 16 European Law Journal 1 (2010).

[145] P. Wennerås, *Sanctions against Member States under Article 260 TFEU: Alive, but not Kicking?*, 49 Common Market Law Review 145 (2012); B. Jack, *Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?*, 19 European Law Journal 404 (2013). In the context of international relations the trend is the same – sanctions rarely work: C. Portela, *European Union Sanctions and Foreign Policy*, Routledge, London: 2011.

[146] Jack, *supra* note 145, p. 420.

[147] *Ibidem*.

[148] Sadurski, *supra* note 22.

Most importantly, given that the fines are never high enough to crush the Member State financially (for a very good reason),[149] they will most likely not result in compliance in the countries where the issue is politically sensitive – already in the context of the European Neighbourhood Policy the EU learned hard way that while cosmetic changes are for sale, one cannot buy regime change.[150] What is of overwhelming relevance here is that the Article 2 TEU issues are *the most sensitive imaginable*. Fining a country that is having problems with democracy and the Rule of Law for precisely this state of affairs is overwhelmingly tricky. If the problems with democracy and the Rule of Law are real, this means that we are speaking about a country where the bridge between voters' preference and the people in power is either seriously threatened or broken. Using Article 260 TFEU in such a context produces a picture which is quite different from fining a country which has been failing to transpose a directive because of some technical obstacles or out of sheer sloppiness. Most importantly, the costs of (non-)compliance are radically different in the cases of the two countries in question. When the cost of compliance *de facto* is nothing short of a regime change (i.e. switching to democracy and the Rule of Law with all the accountability mechanisms, judicial independence, and the possibility to lose elections), no fine will work: the country will be paying ever increasing amounts. In this context it matters little whether the money is actually recovered into the budget of the Union or not – an issue which is central to the second part of Kim Scheppele's proposal. The whole point of financial penalties is *to bring about compliance*, not to initiate an internal reallocation of funds within the EU. To quote Brian Jack again, "[t]he Court's financial penalty clearly has not had the intended coercive effect."[151] The fact that fines do not actually increase compliance is great news though, since it means that the problem of passing secondary legislation in order to recover the fines into the EU budget does not even arise, making the proposal (its first part at least) virtually immediately deployable.

CONCLUSIONS

Both proposals analyzed in this article are probably less revolutionary than they might seem at the first glance, yet they illustrate quite clearly the variety of the solutions theoretically in front of the Member States and the institutions of the Union for dealing with the crisis of values, which is plaguing the integration exercise at the moment. Besides, the two proposals unquestionably serve as vital reminders of the limitations faced

[149] Communication from the Commission [SEC(2005) 1658] (as updated).

[150] N. Tocci, *Can the EU Promote Democracy and Human Rights through the ENP? The Case for Refocusing on the Rule of Law*, [in:] M. Cremona & G. Meloni (eds.), *The European Neighbourhood Policy: A Framework for Modernisation?*, EUI Working Paper LAW 2007/21, p. 29; A. Magen, *The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?*, 12 Columbia Journal of European Law 383 (2006).

[151] For a discussion of numerous *Commission v. Greece* cases, *see e.g.* Jack, *supra* note 145, p. 413.

by any initiative aiming at turning Article 2 TEU into a directly enforceable provision. The EU federalism is at a cross-roads and should tread forward in the most delicate way in dealing with the challenges posed by defiant Member States like Hungary.

Given that bundling is already *de facto* practiced by the Commission, enriching this practice to include key principles and values underlying EU law seems doable. This depends more on the institutions' political will than anything else. The same theoretically concerns the possibilities which EU citizenship and human rights provisions open up in front of those local courts willing to test the limits of the scope of EU law in the context of the preliminary reference procedure. Given the very nature of the problems which the two proposals aim to tackle, however, it seems clear that entrusting the organs (including the judiciary) of the problematic Member States with ensuring compliance with Article 2 TEU can exacerbate the problems rather than solve them. The proposal reinforcing the Commission's role in dealing with the problematic Member States is thus instantly preferable.

At the same time, it has to be kept in mind that the eternal problem of whether we want to give a *carte blanche* to the Court becomes particularly acute in the context of the proposals at issue. While the analogy with the story of making human rights protection part of the *acquis* might convince some, it is perfectly imaginable that the choice of the Court as *the* actor to solve the problems which the EU and the Member States are facing – which is implied in both proposals in question – will necessarily be one of the most difficult elements to sell, should either of the two proposals ever become operational. This is particularly so given the EU's own feeble democracy credentials.[152] It is most telling in this respect that the Commission's own vision – albeit preliminary of course – of what the Union should do in the current situation does not make a strong effect on the ECJ at all.

The Court's augmented role can be presented in a particularly problematic light given the fact that we are not speaking about the EU *acquis* here: what we are speaking about is allowing the ECJ to redesign national democracies of the Member States, possibly without, one has to add, any clear and unquestionable authorization in the Treaties. In an atmosphere where there is no underlying ideal of Justice in sight[153] and the *Ethos* of the whole enterprise is befogged beyond being decipherable at times,[154] critics no doubt will rightly jump on this aspect of both proposals, and this notwithstanding the fact that Article 7 TEU has been consistently criticized precisely for the seemingly insufficient role which it accords to the ECJ to play.

Lastly, the emphasis on the recovery of fines and lump-sums in one of the proposals (the other being entirely silent on the *actual* enforcement) fails to demonstrate a clear and direct connection between financial penalties and the defence of values. Indeed, the whole history of EU external relations seems to illustrate quite clearly that sanctions

[152] Closa et al., *supra* note 5, p. 25.

[153] *See* e.g. G. de Búrca, D. Kochenov & A. Williams (eds.), *Debating Europe's Justice Deficit: The EU, Swabian Housewives, Rawls, and Ryanair*, EUI Working Paper LAW 2013/11.

[154] Williams, *supra* note 20.

(and in the proposal in question we are speaking about penalties of an infinitely smaller, negligible state) do not work. In this sense it is clear that the systemic infringement proposal assumes that a Member State against which the proposal is to be deployed is, *per se*, a Member State actually willing to cooperate. The same problem, alongside numerous others as outlined above, also arises in the context of the Reverse *Solange* proposal: what if the Member State is *not* willing to play along with whatever the ECJ finds? The presumption that the problematic Member States will actually become cooperative Member States is most welcome due to its optimism. Yet in practical terms the EU could very soon find – most regrettably – that such a presumption might actually be untenable in practice. The Greek behaviour in the context of compliance with the *acquis* and the Hungarian behaviour in the context of Article 2 TEU seem to be pointing precisely in the direction of such untenability, which weakens the two proposals even further.

A sober analysis of the alternatives demonstrates, however, that the Member States (via Article 7) or the Commission (via the Copenhagen criteria and their progeny) are likely to deliver still much worse results than either of the two proposals analyzed, however unworkable they might seem in practice. The EU and the compliant Member States find themselves in an increasingly difficult position at the moment. The two proposals are thus merely the starting point in a long array of developments to come, which will be indispensable for the successful survival of the Union as we know it in the face of the mounting challenges, leaning further and further away from the basic principles we all hold dear.